Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1569

THE STATE OF CONNECTICUT,
Petitioner,

v.

PATRICK MENILLO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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The respondent, Patrick Menillo, respectfully prays that the petition for a Writ of Certiorari be denied in that it presents inadequate jurisdictional foundation.

I. CERTIORARI JURISDICTION

Petitioner claims 28 United States Code, Section 1257 (3) to be the bases for this Court's certiorari jurisdiction, which bases, however, do not obtain. The Supreme Court of Connecticut noted that respondent had challenged the constitutionality of Connecticut General Statute, Section 53-29, throughout trial and appeal, *Petitioner's Appendix* at 1a-2a. However, by the time his appeal

was heard, the statute had been declared unconstitutional in toto three times; twice by three-judge federal courts, *Abele v. Markle*, 342 F.Supp. 800 (D. Conn. 1972), *vacated to consider mootness*, 410 U.S. 951,(1973), *upon remand*, 369 F. Supp. 807 (D. Conn. 1973) and once by the Connecticut Supreme Court in *State v. Sulman*, 165 Conn. 556, _____ A.2d. _____ (1973). Therefore, when the *Menillo* appeal was argued, the highest Court of the state had already determined said statute to be unconstitutional in toto. The only "issue" remaining was the effect on Menillo of the prior constitutional holding in *Sulman, supra.*

While "the validity of a State statute [was] drawn in question on the ground of its being repugnant to the Constitution . . . ," 28 U.S.C. 1257(3), and while Menillo claimed his conviction under said statute would and subsequently did violate his constitutional rights, it was unnecessary to reach the former proposition, it having been earlier determined, and the latter was not reached, because the court's decision merely construed the statute invalidated in *Sulman, supra.* Said construction of state law is a function peculiar to the state courts and presents no federal issue, *Wardius v. Oregon*, 412 U.S. 470, 477 (1973); *Grayned v. Rockford*, 408 U.S. 104, 110 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285 (1961).

II. STANDING

Petitioner's "standing" argument suggests, albeit inadvertently, a further jurisdictional deficiency. Article III, Section 2, Clause 1 of the United States Constitution limits Supreme Court jurisdiction to "cases or controversies." State court jurisdiction is not so limited and whether they may render "advisory" opinions is a matter of state law, *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). Therefore, whether Menillo had standing to raise the arguments and issues he presented below is a question of state law not subject to review here as long as standing was not wrongfully denied. This United States Supreme Court/state court jurisdictional dichotomy was examined in *Doremus, supra*:

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Id. at 434. *See also, Cramp, supra.* As both *Cramp* and *Doremus* indicate, Article III standing before this Court is quite different from standing to litigate in the state courts.

Inasmuch as the Supreme Court of Connecticut implicitly found that Menillo had standing before it, any opinion of this Court that Menillo lacked Article III standing would be merely an advisory opinion which would not affect the decision below. Therefore, this Court is without Article III jurisdiction.

III. SEVERABILITY

Roe v. Wade, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973) and *Abele v. Markle*, 369 F. Supp. 807 (D. Conn. 1973) were held to render the Connecticut

abortion statute unconstitutional in toto in *Sulman*, *supra*. Given the determination of complete unconstitutionality in *Sulman*, involving a physician, *Menillo* presented the Connecticut Supreme Court with the question of whether the "[a]ny person" provision of the abortion statute could be judicially construed to embrace respondent Menillo while exempting physicians. The court, while indicating Menillo's conduct could be constitutionally proscribed by an appropriately narrow statute, determined that the law under which he was prosecuted was not such a statute because it indiscriminately included medical doctors. A state's highest court's construction of its statute is binding on this Court, *Wardius*, *supra* at 477; *Grayned*, *supra* at 110; *Thirty-Seven Photographs*, *supra* at 369; *Groppi*, *supra* at 507; *Cramp*, *supra* at 285. Therefore, Menillo contends that no federal question is presented by the Connecticut Supreme Court's holding that none of the abortion statute survived its ruling in *Sulman*. Whether the unconstitutional proscription of abortion by physicians is severable from a possible constitutional proscription of abortion by lay persons is a question of state law, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and presents no federal question for review by this Court, *King v. West Virginia*, 216 U.S. 92 (1909).

In light of the above arguments and authorities respondent Patrick Menillo respectfully submits that this Court is without the necessary jurisdictional bases to review by certiorari the case of *State v. Menillo*, under 28 U.S.C. 1257(3).

Respondent, Patrick Menillo

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